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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-199129

DATE: March 5, 1981

MATTER OF: Dewayne E. Ehret - *[Claim for* Payment of Night Differential *Pay]*

**DIGEST:**

1. Employee of FCC performed nightwork in connection with temporary duty assignments every month or so. In the absence of established tour including nightwork, employee may be paid night differential under 5 U.S.C. § 5545(a) if it is considered "regularly scheduled." That it was performed during temporary duty or on overtime does not affect the employee's entitlement to night differential.
2. Employee's claim for night differential is based upon approximate schedule since no records were kept by supervisor or employee. Supporting evidence such as schedules, time and attendance reports, personal diaries, etc. are acceptable evidence. However, where direct verification of hours worked may be obtained through other official records, those records should be examined before the claim may be paid.

This action is in response to a request from Wayne B. Leshe, Chief Accountant and an authorized certifying officer with the Federal Communications Commission (FCC), for a decision concerning the claim of Mr. Dewayne E. Ehret for additional compensation for 118 hours of night differential pay in connection with certain enforcement monitoring activities he performed during periods of temporary duty.]

Mr. Ehret's claim arises in connection with his performance of duties as an engineering technician assigned to the Detroit, Michigan, Special Enforcement Facility. The Field Operations Bureau of the FCC maintains five offices known as Special Enforcement Facilities (SEF) throughout the United States. The Special Enforcement Facilities each

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plan 12 trips each year to monitor radio transmissions in one of the cities in their assigned area. These monitoring trips are called "strikes" and the monitoring teams are called "strike teams" or "SEF teams" since their monitoring is done in a covert manner to detect violations of FCC regulations. For a general understanding of the circumstances involved in Mr. Ehret's claim the agency reports that the following statements apply to the activities of the "SEF" teams:

- "1. When SEF team employees go out on a strike, they are in the field approximately 7 days.
- "2. On 2, 3, or 4 of those days, the employee's hours are changed temporarily from 8:00 A.M./4:30 P.M. to 1:30 P.M./10:00 P.M., 4:00 P.M./12:00 P.M., or other corresponding hours.
- "3. The interval between the planned strikes is approximately 1 month.
- "4. The individual employee interval can be 1 or 2 months (22 to 70 days) between strikes since all employees do not go out on every strike made by the SEF team.
- "5. Employees are paid overtime for all hours in excess of 8 in a day or 40 in a week.
- "6. Employees are in a travel/temporary duty status while away from their official duty station.
- "7. Strike dates are set on a tentative schedule for a year in advance but may be changed at any time by the SEF supervisor.
- "8. Radio and/or violation logs are maintained during hours worked while on a strike.
- "9. The SEF team travels to a city and sets up a base station at the motel/hotel where the team will sleep. Employees perform mobile monitoring, in vehicles, ranging throughout the city and outlying areas.

The mobile monitoring is coordinated with the base station. The employees return to motel/hotel to sleep."

Finally, the agency also reports that Mr. Ehret made various monitoring trips with the SEF strike team during the period from May 15, 1978, to January 28, 1980. (During each of these monitoring trips Mr. Ehret worked at night some of the time but since no records were kept of the actual times worked each day, either by the supervisor or the employee, the hours claimed are approximate. Mr. Ehret's supervisor has stated that they seem reasonably accurate, and if direct verification is necessary, the agency states that the radio and/or violation logs for each day could be checked.)

On the basis of the information provided above, (the agency asks) the following questions concerning Mr. Ehret's claim:

- "1. Since the interval of these trips for Mr. Ehret ranged from 22 to 70 days, would the trips be considered as night work which would have occurred at regular intervals since they were tentatively scheduled at the beginning of the year for one trip per month even though each employee does not go on every trip?"

The authority for the payment of night differential is contained in 5 U.S.C. § 5545(a) (1976), which provides, in pertinent part, as follows:

"Except as provided in subsection (b) of this section, nightwork is regularly scheduled work between the hours of 6:00 p.m. and 6:00 a.m. \* \* \*."

It is clear that employees who regularly work a night shift are entitled to night differential added to their basic compensation. See, for example, 36 Comp. Gen. 657, 659 (1957) citing the legislative history of the statute. Where there are no scheduled tours of duty at night, our decisions have held that an employee, who habitually and recurrently performs

work at night due to the inherent nature of his employment by which he must remain on duty until his tasks are completed or he is relieved from duty, is entitled to night differential. 42 Comp. Gen. 326 (1962); 41 id. 8 (1961); and Nathaniel R. Ragsdale, B-181237, April 15, 1975, affirmed, 57 Comp. Gen. 43 (1977). See also 59 Comp. Gen. 101 (1979).

We have also allowed payment of night differential in the absence of an established tour of duty or shift where the work to be performed is considered to be "regularly scheduled work." 59 Comp. Gen. 101, supra, and decisions cited therein.

Our decisions have held that "regularly scheduled" means duly authorized in advance and scheduled to recur on successive days or after specified intervals. 42 Comp. Gen. 326, supra; 40 Comp. Gen. 397 (1961); Robert C. Austin, B-188686, May 11, 1978; and B-174388, February 28, 1972. Work performed every other week or 1 or 2 days every month has been considered regularly scheduled. See 39 Comp. Gen. 73 (1959); and B-159040, July 12, 1966. The work need not be subject to a fixed hours-of-work schedule but it must recur so frequently and at such regular intervals as to fall into a predictable and discernible pattern. See Customs Special Agents, B-191512, October 27, 1978, and B-178653, August 6, 1973.

In the present case it appears that "strike team" assignments are scheduled each month, and, in the case of Mr. Ehret, he performed such assignments 17 out of 21 consecutive months. On each assignment some nightwork was performed, usually on Tuesday through Friday during a Monday to Monday assignment. Although the intervals between assignments may have varied, we believe the performance of nightwork fell into a predictable and discernible pattern so as to warrant the payment of night differential for "regularly scheduled work" under these circumstances.)

"2. ( Can Mr. Ehret be paid night differential for nightwork performed while in travel

status or on temporary duty of 2 to 7 days?"

Office of Personnel Management regulations implementing the night pay differential provisions of 5 U.S.C. § 5545(a) are contained at Part 550 of Title 5, Code of Federal Regulations (1979). In regard to the computation of night pay differential subsection 550.122 provides that an employee otherwise entitled to night pay differential retains that entitlement for night hours of his tour of duty while he is in an official travel status, whether he is performing actual duty or not. Moreover, that same subsection also provides that an employee is entitled to a night pay differential for nightwork performed when he is assigned temporarily to a tour of duty other than his own. See also 48 Comp. Gen. 334, supra, involving the payment of "regularly scheduled" overtime to employees performing temporary duty assignments. We know of no basis to preclude Mr. Ehret's entitlement to night pay differential under these circumstances.

"3. Would Mr. Ehret be considered to have been assigned to a regularly scheduled tour of duty other than his own regular tour even though the different tour of duty did not exist for that day until selected that day by the on-site "strike team" supervisor."

It does not appear that the FCC established a tour of duty under 5 U.S.C. § 6101 to include nightwork during these "strike team" assignments since the on-site supervisor scheduled the tour of duty day-by-day. Section 6101 contemplates scheduling tours of duty at least 1 week in advance. Therefore, in the absence of a scheduled tour at night, we must consider whether the work was "regularly scheduled" as described above.

The term "regularly scheduled" means duly authorized in advance and scheduled to recur on successive days or after specified intervals. This is to be distinguished from work which is scheduled on a day-to-day or hour-to-hour basis. See 52 Comp. Gen. 319, 322 (1972); B-151168, May 25, 1976; and B-168948, February 16, 1970. In the context of overtime under

5 U.S.C. § 5542(a), we have held that notification must take place 1 to 4 days in advance of the work. See 52 Comp. Gen. 319, supra, and 48 id. 334, supra. See also 59 Comp. Gen. 101, supra.

The submission from the FCC suggests that the employees were scheduled on a day-by-day basis to perform night work. However, the schedule of work performed by Mr. Ehret indicates that, with few exceptions, he worked 1:30 p.m. to 10 p.m. each Tuesday through Friday for each 7-day assignment from May 1978, through September 1979. Based upon this record, we believe that although a regular tour of duty did not exist, the nightwork which was performed may be considered "regularly scheduled" for the purposes of paying night differential.

- "4. Since overtime was worked by Mr. Ehret during some of the days shown on the attached schedule, would night differential be payable for the occasional overtime worked (either paid as overtime or taken as compensatory time) during any periods of 6:00 P.M. and 6:00 A.M.?"

Although it is not clear from the record, we presume the agency is paying overtime under 5 U.S.C. § 5542 for hours of work performed by Mr. Ehret which are in excess of 8 hours in a day or in excess of 40 hours in an administrative workweek, officially ordered or approved, and actually performed by the employee. See 5 C.F.R. § 550.111 (1979). In this event our decisions have held that overtime performed by an employee between the hours of 6 p.m. and 6 a.m. may result in the payment of night differential. See 59 Comp. Gen. 101 (1979), supra, and decisions cited therein. See also 5 C.F.R. § 550.122(d) (1979).

We note that night pay differential under 5 U.S.C. § 5545(a) and overtime pay under 5 U.S.C. § 5542 are two distinct forms of compensation which may vest as two separate entitlements for a qualifying employee. This conclusion also follows from the following night pay differential computation provisions contained at 5 C.F.R. § 550.122(c) (1979):

"(c) Relation to overtime and holiday pay. Night pay differential is in addition to overtime or holiday pay payable under this subpart and it is not included in the rate of basic pay used to compute the overtime or holiday pay. An employee earns the same amount of night pay differential during a night overtime period, whether he is paid in money or granted compensatory time off for the overtime work."

"5. Would payment of the attached voucher in the amount of \$201.16 to Mr. Dewayne E. Ehret be proper, correct and legal?"

Our remaining concern is with the fact that Mr. Ehret's claim is based upon an "approximate schedule" that has been endorsed only as "reasonably accurate" by his immediate work supervisor. Under 31 U.S.C. § 71, it is within the discretion of this Office to determine what evidence is required to support claims for compensation. Unofficial work schedules, Time and Attendance Reports, personal daily diaries, and certificates of former supervisors showing the amount of nightwork and overtime worked by the claimant or a statement as to the standard workweek, including nightwork and overtime performed by the claimant or other similarly situated employees, are examples of supporting evidence which might be sufficient to support payment of a claim for night pay differential as well as overtime compensation. However, in accordance with our claims settlement procedures set forth at 4 C.F.R. § 31.7 (1980), we do not find that Mr. Ehret has satisfactorily met his burden as a claimant for establishing the liability of the United States and his right to a specific money claim. This is especially true since, as the agency indicates, direct verification of specific hours of nightwork and overtime work may be obtained through resort to available official records. Therefore, only those hours of nightwork and overtime work which were actually performed, subject to official verification, may be considered in computing

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Mr. Ehret's night pay differential and overtime pay entitlements.

*Shelton J. Aorlan*

Acting Comptroller General  
of the United States